

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

TERRANCE CARR,

Defendant.  
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ORDER

06-C-418-C

05-CR-0032-C

Defendant Terrance Carr has filed a timely motion for vacation of his sentence pursuant to 28 U.S.C. § 2255, alleging that the sentence imposed on him on August 4, 2005, is illegal because he was not made aware that he would be sentenced as a career criminal and because his counsel failed to investigate defendant's prior criminal convictions that qualified him for career offender status. Defendant insists that he does not wish to withdraw his plea and admits that he committed the crimes that served as predicates for his career offender sentencing enhancement. His challenge is only to the length of his sentence.

The failure to raise an issue on direct appeal generally bars a defendant from raising it later in a post-conviction proceeding. Barker v. United States, 7 F.3d 629, 632 (7th Cir.

1993). Motions under § 2255 motions are vehicles for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect resulting in a complete miscarriage of justice, Reed v. Farley, 512 U.S. 339, 353-54 (1994); they are not intended as a substitute for direct appeal. Daniels v. United States, 26 F.3d 706, 711 (7th Cir. 1994). To the degree that defendant takes issue with this court's decision to sentence him as a career offender, his challenge is barred by his failure to raise the matter on direct appeal. However, even if defendant's challenge had been timely, it would not succeed because it rests on a misunderstanding of the relevant law.

In his motion, defendant makes two arguments about the court's decision to sentence him as a career offender. First, he asserts that his two drug convictions in Dane County Case Number 1997CF2252 and La Crosse County Case Number 1998CF517 should count as a single offense because he served concurrent sentences for his crimes. Second, defendant asserts that "the career offender label and enhancement consequences are designed to be applied to an individual who just doesn't get it." Dkt. #20, at 14. Although defendant acknowledges that his past conduct was "unlawful . . . criminal and . . . an example of extremely poor judgment," he believes that because he did not "making his living as a drug dealer," he should not be considered a career offender. Id. Neither argument has legal merit.

Under the sentencing guidelines, a defendant is considered a career offender if (1) he was at least eighteen years old at the time he committed the offense for which he is being

sentenced; (2) the present offense is a felony that is either a crime of violence or a controlled substance offense; and (3) he has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1(a). Defendant admits that he was at least eighteen when he committed the controlled substance offense that led to his present sentence. He admits also that he was previously convicted and sentenced for possession of cocaine with intent to deliver in Dane County Case Number 1997CF2252 and manufacturing and delivering cocaine in La Crosse County Case Number 1998CF517. Nevertheless, defendant asserts that his state court convictions should be counted as a single conviction for sentencing enhancement because the two state cases were consolidated and his sentences ran concurrently.

The sentencing guidelines state that “prior sentences imposed in related cases are to be treated as one sentence, U.S.S.G. § 4A1.2(a)(2); therefore, whether any two prior convictions may be counted separately for purposes of the career offender provision depends upon whether the sentences imposed for the convictions are “related” to one another. United States v. Best, 250 F.3d 1084, 1094 (7th Cir. 2001). Ordinarily, prior sentences are considered “related” if they resulted from offenses that (1) occurred on the same occasion; (2) were part of a single common scheme or plan; or (3) were consolidated for trial or sentencing. United States v. Graves, 418 F.3d 739, 744 (7th Cir. 2005). Because defendant’s sentences were consolidated for sentencing, he argues that they should be treated

as related offenses and count as a single sentence.

However, an exception to the general consolidation rule applies to crimes that were consolidated at sentencing but were committed at separate times. Application Note 3 to § 4A1.2 states that “[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense).” Defendant’s offense in Dane County Case Number 1997CF2252 was committed on November 7, 1997. He was arrested immediately. On November 10, 1997, defendant was released on bond. Then, on September 8, 1998, a new warrant was issued for defendant’s arrest in La Crosse County Case Number 1998CF517, for drug dealing that had occurred on August 12, 1998. In preparing the presentence investigation report in the present case (a report to which defendant did not object), the probation office recommended that defendant’s state court convictions be counted as separate offenses “because the [] cases that were consolidated for sentencing were separated by intervening arrests.” Because’s two predicate offenses were committed on separate occasions and were separated by an arrest, the court did not err by counting defendant’s convictions in Dane County Case Number 1997CF2252 and La Crosse County Case Number 1998CF517 as separate offenses under U.S.S.G. § 4B1.1(a).

Defendant’s second claim is related to his first: he contends that by failing to object to the court’s decision to sentence him as a career offender, his lawyer violated his

constitutional right to the effective assistance of counsel. Unlike defendant's first claim, which was forfeited by his failure to raise it on direct appeal, defendant is free to raise a claim of ineffective assistance at any time. Massaro v. United States, 538 U.S. 500, 504 (2003).

The standard for assessing the effectiveness of counsel was established in Strickland v. Washington, 466 U.S. 688 (1984). To show constitutionally ineffective assistance, a defendant must prove that counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable probability that but for counsel's objectively unreasonable performance the result of the proceeding would have been different. Id. If it is clear that prejudice did not result from counsel's act or omission, a court may deny a claim of ineffective representation without determining whether the representation was constitutionally ineffective in fact.

Misinformation from a defendant's attorney, such as an incorrect estimate of severity of a criminal offense, standing alone, does not constitute ineffective assistance of counsel. Barker v. United States, 7 F.3d 629, 633 (7th Cir. 1993) (citing United States v. Arvanitis, 902 F.2d 489, 494 (7th Cir.1990)). But more important than the lack of deficient performance in this case is the fact that defendant cannot show he was prejudiced by his counsel's alleged errors. The prejudice defendant must show is that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985). However, defendant admits that he committed the prior crimes upon which his career offender enhancement rests. Moreover, defendant does not contend that he would not have pleaded to the present offense had he known he would be sentenced as a career offender. In fact, he states explicitly that he “is not challenging his plea.” Dkt. #20, at 5. Consequently, he has not alleged any prejudice.

Although defendant has framed his challenge in terms of his lawyer’s alleged ineffectiveness, he is really restating his challenge to the court’s sentencing calculation. Defendant believes that if his counsel had “investigated” his prior convictions more thoroughly, counsel would have realized that the cases had been consolidated and would have concluded (as defendant has mistakenly done) that defendant’s past drug convictions should be counted as a single offense. However, as discussed above, the offenses were properly treated as separate crimes. No matter how thoroughly counsel investigated the prior convictions, he could not have changed their effect.

Defendant’s sentence is a long one and it is understandable that he finds it harsh. Nevertheless, it is legal. Because defendant has not shown that his sentence was “imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,” 28 U.S.C. § 2255, his motion

must be denied.

ORDER

IT IS ORDERED that defendant Terrance Carr's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 is DENIED.

Dated this 23d day of August, 2006.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge